APPEAL NO. 042529
FILED NOVEMBER 19, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 31, 2004. The hearing officer determined that the appellant (claimant) is not entitled to receive supplemental income benefits (SIBs) for the 13th quarter. The claimant appealed based on sufficiency of the evidence grounds. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The claimant attaches to her appeal a compact disc (CD) that reflects a recorded conversation between the claimant, the claimant's husband, and the claimant's vocational counselor. The claimant stated in her appeal that this CD was in her possession at the time of the CCH and that it was not offered as evidence at the CCH. The Appeals Panel will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence attached to the claimant's appeal does not meet this test. Since the evidence was not admitted at the CCH and does not constitute newly discovered evidence, we cannot consider it on appeal.

Additionally, the claimant for the first time on appeal raises an objection that the carrier's witness, a vocational counselor, should not have been allowed to testify at the CCH. Review of the record reflects that the claimant did not object to the vocational counselor testifying, therefore the claimant did not preserve error. We will not consider the claimant's objection for the first time on appeal.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the 13th quarter. The claimant contended that she had no ability to work during the qualifying period. Although making some job contacts during the qualifying period the claimant principally proceeds on a total inability to work theory.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

Conflicting evidence was presented on the disputed issue. The hearing officer determined that the narrative report failed to establish a total inability to work, and that other records showed that the claimant had an ability to work. The hearing officer found that during the 9th week of the qualifying period (March 19 through March 25, 2004) the claimant did not contact the Texas Workforce Commission or potential employers, and that one visit to the Texas Department of Assistive and Rehabilitative Services did not constitute a good faith search for employment.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

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Veronica L. Ruberto
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Gary L. Kilgore
Appeals Judge